No. 172.

Brief of Wickham for P.E.

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JAMES H. MCKENN

# Supreme Court of the United States,

October Term, A. D., 1897.

Filed Dec 1, 1897.

No. 172.

THE RICHMOND & ALLEGHANY RAILROAD COMPANY, AND OTHERS, PLAINTIFFS IN ERROR,

vs.

R. A. PATTERSON TOBACCO COMPANY, DEFENDANT IN ERROR.

*In error to the Supreme Court of Appeals of the State of Virginia.*

## *BRIEF FOR PLAINTIFFS IN ERROR.*

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HENRY TAYLOR, Jr.,
Counsel for Plaintiff in error.

RICHMOND:
TAYLOR & TAYLOR PRINTING CO.,
1897.

# IN THE

# Supreme Court of the United States,

OCTOBER TERM, 1897.

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RICHMOND & ALLEGHANY R. R. CO. ET ALS., Appellant.

vs.

R. A. PATTERSON TOBACCO CO., Appellee.

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## BRIEF FOR THE APPELLANT.

The facts in this case are brief and are as follows:

The Richmond and Alleghany Railroad Company, by proper proceedings had, in the Circuit Court of the city of Richmond, Va., was placed in the hands of receivers, who for some years operated the said road and under appropriate proceedings the property was sold and passed into the hands of other parties. The receivers were discharged and the case retained on the docket of the Circuit Court of the city of Richmond for the purpose of disposing of claims that might have arisen during the receivership.

Such a claim was presented by the R. A. Patterson Tobacco Company and its petition filed in the cause claiming

to be reimbursed for the loss of certain tobacco shipped from Richmond, Va., to Mann & Levy, at Bayou Sara, Louisiana, and alleged to have been lost through the negligence of the carrier (ms. pp. 12–13). With the petition was filed the bill of lading marked exhibit A. (ms. pp. 14–17). To this petition the Richmond and Alleghany Railroad Company answered, (ms. p. 17) and the cause coming on to be heard on the petition and the exhibit therewith filed, the answer of the Richmond and Alleghany Railroad Company and the statement of facts agreed, the decree complained of was entered by the Circuit Court of the city of Richmond (ms. p. 18).

From this decree an appeal was taken to the Supreme Court of Appeals of Virginia, which court rendered its decision on March 13, 1896, affirming the court below (ms. pp. 19–20), as per the opinion of the court, printed at mss. p. 21.

From these proceedings it appears that on August 1, 1888, the R. A. Patterson Tobacco Company delivered to the receivers of Richmond and Alleghany Railroad Company at Richmond, Virginia, a lot of tobacco consigned to Mann & Levy, at Bayou Sara, Louisiana, to be transported in accordance with the bill of lading filed with the petition of the R. A. Patterson Tobacco Company. This tobacco was lost after the same had passed out of the possession of the Richmond and Alleghany Railroad Company. The answer of the Richmond and Alleghany Railroad Company sets up among other defences "that even if the statement contained in said petition were true, no liability would be incurred by respondents for the following reason, to-wit: Respondent has been informed and believes and charges that the loss referred to occurred beyond the terminus of its line and upon a connecting line, over which it had no authority or control."

This matter came on to be heard upon the petition, the bill

of lading filed therewith, the answer of the Richmond and Alleghany Railroad Company, and the following facts agreed:

"That the bill of lading was not signed by the shippers or their agent, that the shipment was an inter-state one, and the tobacco was delivered by the R. & A. Railroad Company to the next succeeding carrier and was lost after the same had left the possession of the Richmond and Alleghany Railroad Company; that the sole question submitted to the court and passed on was whether section 1295, Code of Virginia, 1887, was in conflict with article I, section 8, clause 3, of the Constitution of the United States, it being admitted that if said section, 1295, was constitutional the defendant was liable; but if it was not constitutional, then under the contract of shipment the defendant was not responsible."

The bill of lading, amongst other things, provides: "Consigned to Mann & Levy, at Bayou Sara, La., to be transported by the Richmond and Alleghany railroad to —— and there to be delivered to connecting railroad or water line, and so on by one connecting line to another until they reach the station or wharf nearest to the ultimate destination, * * * it is mutually agreed that the liability of each carrier as to goods destined beyond its own route shall be terminated by proper delivery of them to the next succeeding carrier * * * in case of loss, * * * imposing any liability hereunder the transportation company or carrier in whose actual custody they were at the time of such loss * * * shall alone be responsible therefor * * *. The acceptance of this bill of lading is an agreement on the part of the shipper, owner and consignee of the goods to abide by all its stipulations, exceptions and conditions, as fully as if they were all signed by such shipper, owner and consignee."

As appears from the agreed statement of facts this contract or bill of lading was not signed by the shipper and under

section 1295 of the Code of Virginia, the judge of the Circuit Court of the city of Richmond, held that the appellant was liable for the loss of the goods after the same had left its possession, because of the requirements of said section, which judgment of the said Circuit Court of the city of Richmond was affirmed by the Supreme Court of Appeals of Virginia, the court of last resort.

## Assignment of Error.

The court will perceive from the foregoing statement of the case that the question involved is as to the constitutionality of Section 1295 of the Code of Virginia, 1887, which section is as follows :

Sec. 1295. *Liability of carrier for loss or injury to goods.* When a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless, at the time of such acceptance, such carrier be released or exempted from such liability by contract in writing signed by the owner or his agent; and, although there be such contract in writing, if such thing be lost or injured, such common carrier shall himself be liable therefor, unless, within a reasonable time after demand made, he shall give satisfactory proof to the consignor that the loss or injury did not occur while the thing was in his charge.

The Supreme Court of Appeals of Virginia held that the said section was not in conflict with Article I, Section 8, Clause 3 of the Constitution of the United States, which is as follows :

"The Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The constitutional question being clearly raised in the record and the decision of the highest court being in favor of the validity of the statute, this court is now asked to review and reverse said decision.

## ARGUMENT.

Where the subject of a contract is the transportation of articles of commerce from one State to another, the sole and exclusive power to prescribe its terms is vested by the Constitution in Congress, and no power is left in the State by which it can make any regulation; and non-action on the part of Congress, where the subject is national in its character or admits of uniformity of regulation, means that there shall be no regulation by the State.

*Gibbons vs. Ogden*, 9 Wheaton, p. 1.
*State Freight Tax Cases*, 15 Wall., p. 232, see 279–280.
3. *Walton vs. State of Missouri*, 91 U. S., p. 275.
4. *Henderson vs. Mayor New York*, 92 U. S., p. 259, see 272–3.
*Hall vs. DeCuir*. 95 U. S., p. 485, see 490.
*Mobile vs. Kimball*, 102 U. S., p. 691.
*Gloucester Ferry Co. vs. Penn*, 114 U. S., p. 196, see 203–4.
*Brown vs. Houston*, 114 U. S., p. 622.
*Walling vs. Michigan*, 116, U. S., p. 446, see 455.
*Bowman vs. Chicago etc. Railway Co.*, 125 U. S., p. 465.
*Leisey vs. Hardin*, 135 U. S., p. 100.
*Norfolk, etc. Railroad Company vs. Penn*, 136 U. S., p. 114.

From the opinion of the Supreme Court of Appeals of Virginia, which will be found in the record (ms. pp. 21 to 29), it will be seen that it is conceded that but for the statute in question there would be no liability upon the appellant, be-

cause in accordance with the contract made between the appellant and the appellee, the appellant had safely delivered the goods in question to the next succeeding carrier and by the contract the responsibility of the appellant for the safety of the goods thereupon terminated. It is also conceded that the subject matter to which the statute relates, viz.: The contract between the shipper and the carrier, is of such a nature that it is capable of being dealt with by general regulation and that therefore the power of Congress under the Constitution of the United States is exclusive, and it is further conceded that non-action by Congress in such a case is equivalent to a declaration of the will of Congress that the subject-matter should be free and uncontrolled by State regulation.

If then the statute in question does in any manner regulate commerce, it must be void as in conflict with the Constitution, but it is held by said court that the statute does not regulate or control the parties in the making of the contract and for that reason is not unconstitutional. It is said that "the law is careful to avoid any interference with the utmost freedom in the making of contracts and does not in any way attempt to control the legal effect of the contract when made." How can this be when in the same breath the court says that but for the statute there would be no liability on the part of the appellant? The carrier and shipper for their mutual advantage had seen fit to make the contract in the way it was made and the shipper had agreed that "the acceptance of this bill of lading is an agreement on the part of the shipper, owner and consignee of the goods to abide by all its stipulations, exceptions and conditions as fully as if they were all signed by such shipper, owner and consignee," and yet in spite of this contract as thus made and because of the statute, an entirely different contract is enforced by the court. How then can it possibly be said that the statute leaves the parties free to make such

contract as they please and that it in no way controls the legal effect of the contract when made? If the statute does not in terms control the parties, the interpretation or construction of it by the Supreme Court of Appeals of Virginia gives it that effect. While the statute does not say that certain exceptions, conditions or stipulations shall be void, though embraced in the contract yet it does in effect say that the stipulation that the carrier shall not be liable beyond the terminus of his own line, though embraced in the contract as made shall be void unless the contract is made in writing and signed by the shipper, and it even goes further and says that though the contract be in writing and signed by the shipper, that stipulation shall be void unless in a reasonable time the carrier gives satisfactory proof to the consignor that the loss did not occur while the thing was in his charge. While the Supreme Court of Appeals of Virginia says that the statute does not regulate or control the contract and the parties while making it and that it does not control the legal effect of the contract when made, yet said court holds that the statute establishes a rule of evidence and that the legislature constitutionally may pass such a statute. It does not help the argument to call it a statute which establishes a rule of evidence because if the effect of a rule of evidence is to deprive the carrier and shipper of the right to be left free to make such contract as to them may seem best suited to their respective interests for an inter-state shipment, the statute is as much unconstitutional as if it had in terms provided that it was intended to regulate and control the contract and the parties when making it. The forbidden result cannot be accomplished by giving to the means employed an innocent name.

Statutes relating to insurance policies and the statutes of frauds, which exist in all of the States, are valid and constitutional because the power to legislate on such matters has

never been surrendered by the States, while the power to legislate on the subjects or instrumentalities of inter-state commerce has been surrendered by the States and when the subject is capable of being dealt with by general regulation the power in Congress is exclusive. It may be that the statutes of frauds or the laws relating to insurance policies incidentally affect commerce just as laws on almost any conceivable subject may and do, in that sense, affect commerce; but such laws are very different from a law which deals directly and only with a common carrier and the shipper when engaged in making their contract for an interstate shipment. There can be no shipment of goods without a contract. This contract may be implied, it may be verbal or it may be in writing, either signed by one or both parties or by neither. Congress has seen fit not to legislate on the subject of such contracts. This contract is an essential instrumentality of commerce, without which commerce cannot exist and it admits of and requires a general regulation applicable to the whole country, therefore the non-action by Congress means that the parties to this contract shall be free to make it in such form and with such provisions (not contrary to public policy) as they please, yet the statute in question imposes a liability or penalty on one of the parties, unless the contract is in writing and signed. How then can it be said that these parties are free to make such a contract as they may think best for their interests? A further reason given by the Supreme Court of Appeals of Virginia why the statute should be sustained is that "the statute under consideration was doubtless conceived in a like spirit as a necessary and salutary precaution and safeguard against the dangers to which experience had shown that shippers were exposed." If the statute neither interferes with the utmost freedom in making contracts nor controls the legal effects of the contract when made, how then does it provide necessary and salutary precautions and safeguards against the dan-

gers to which experience has shown that shippers were exposed when left free to make such contracts and in such form as may seem best to the respective interests of the parties to the contract? If experience has shown that shippers need to be provided with precautions and safeguards against dangers arising from being allowed to make their own contracts with carriers in such form as they may choose, then it is the province of Congress to act; it has the exclusive power. This may be a good reason for the passage of such a law by Congress, but can hardly be a good reason why this act of the State legislature is constitutional.

This shipment started from Richmond, Virginia and its final destination was Bayou Sara, a point in Louisiana. The route was through six separate States of the Union. Experience may have shown the six separate legislature of these States that it was necessary to provide in six separate and conflicting ways against what they may assume to be dangers to which shippers were exposed. Could a carrier subject to six separate and conflicting laws possibly conduct its business with any satisfaction to itself or its patrons under such circumstances as these? Either the consignor in Virginia or the consignee in Louisiana can sue for the loss of these goods. Virginia has seen fit to say to the carrier, you shall be liable unless you make your contract in a particular way. Louisiana may have seen fit to say to the carrier, you shall be liable unless you make your contract in a different way. Under such circumstances how could the rights of these parties to this contract be properly determined? It was the object of the framers of the Constitution to furnish a safeguard against such dangers as this, to which commerce would be exposed, and for this reason they placed this provision in the Constitution of the United States. When this court came to pass on this provision of the Constitution of the United States they hold this power exclusive of all State legislation except in those matters which were local in their

nature and which could be best controlled by local legislation varying to suit the interests of each case, e. g. harbors, pilotage, etc., and except as regards such matters as may properly come under the reserved police power of the State.

It is not contended that every State statute that relates to or affects bills of lading is unconstitutional. Statutes making bills of lading negotiable, *while they relate to and affect the contract after it is made*, do not relate to nor affect the parties in making the contract nor do they relate to or affect the contract as between the parties thereto, but they simply declare what shall be the effect when other parties than those to the contract undertake to deal with the the bill of lading. Such laws may or may not be constitutional, this question is not now and never has been before this court for decision, but they are in no sense similar to a law which attempts to control and regulate the shipper and carrier in making their contract of inter-state carriage, and which imposes a penalty if its requirements are not complied with. So far as we are advised the constitutionality of statutes making bills of lading negotiable has never been raised in this court. It was certainly not raised in *Shaw vs. Mer. Nat'l Bank of St. Louis*, 101. U. S., p. 557, and we do not understand that this court of its own motion raises and decides points not made in the record and pleading, unless it be some question going to the jurisdiction of this court. The constitutional question not having been raised or discussed it would have been strange indeed if Mr. Justice Strong had raised and passed on the question as it is suggested by the Supreme Court of Appeals of Virginia, he would have done, had this court not considered the laws of Missouri and Pennsylvania relating to bills of lading, involved in the Shaw case, constitutional. It is an unvarying rule that no objection to the constitutionality of a law will be considered by this court unless raised by the party affected and decided by the court below.

The Supreme Court of Appeals of Virginia further says that laws have been upheld which declare "all contracts, receipts, rules and regulations * * void" which exempt a railroad company or other person from full liability as a common carrier, citing for authority on this question, *Talbott vs. Merchants Dispatch Company*, 41 Iowa, p. 247; and *McDaniel* vs. *Chicago, etc. Railroad Company*, 24 Iowa p. 412.

Had the Iowa court made any such ruling it would certainly not be authority in this court, but in neither of these cases was any question raised as to the constitutionality of the Iowa statute. In both cases the only question passed on was whether the contract under consideration should be construed by the law of Iowa or by the law of Connecticut in the one case, and by the law of Illinois in the other. Surely these two cases cannot be considered authority for the constitutionality of the Iowa statute involved.

The case of *Smith vs. Alabama*, 124 U. S. p. 465, was a clear case of the exercise of the police power of the State of Alabama, the statute in question in that case only incidentally affecting commerce and the validity of the statute was upheld. The finding of the court at p. 482, being:

First: "That the statute of Alabama, the validity of which is under consideration, is not, construed in its own nature, a regulation of inter-state commerce, even when applied as in the case under consideration; secondly, that it is properly an act of legislation within the scope of the admitted power reserved to the State to regulate the relative rights and duties of persons being and acting within its territorial jurisdiction, intended to operate so as to secure for the public safety of persons and property; and thirdly, that so far as it affects transactions of commerce among the States, it does so only indirectly, incidentally and remotely, and not so as to burden or impede them, and in the particulars in which it

touches those transactions at all, it is not in conflict with any express enactment of Congress on the subject, nor contrary to any intention of Congress to be presumed from its silence."

The Virginia statute on the contrary when considered in its own nature is a regulation of inter-state commerce. In *Almy vs. California*, 24 Howard, page 169, Chief Justice Taney, at pages 173–4, says: "A bill of lading or some written instrument of the same import is necessarily always associated with every shipment of articles." Indeed it may be said the contract of shipment absolutely controls and regulates all commerce, and the power which can control or regulate the contract of shipment controls commerce. In *Railroad Company vs. Railroad Commissioner of Tennessee*, 19 Federal Reporter, 679, Hammon, Judge, at page 710, says: "But when a plain and unmistakable case of direct action on the commerce itself is presented, as all regulations or restrictions on the contract of transportation must be, all that need be looked to is the character of the commerce so regulated, and if it be inter-state transportation, as defined in the cases cited, regulation or restriction by the State is void." The very essence of the matter is well expressed by Mr. Francis Cope Hartshorne in his work entitled "The Railroads and the Commerce Clause," when at page 87, he says: "But if it be essentially an attempt on the part of the State to deal with matters which are more properly the subject of *contract* between the carrier and the person employing him, then it is an attempt to restrict his freedom in making contracts, and must be void when the contract sought to be made is one in the course of inter-state transportation. * * * All rights, duties and liabilities which have their origin in a contract between the parties and have no connection with the good order, peace and safety of the community, but only with the convenience or

commercial advantage of the contracting parties, can only be modified or added to by the authority which has the exclusive jurisdiction of the subject matter of such contracts."

It is well settled that the State cannot directly regulate the compensation of the common carrier for inter-state business.

*Wabash, &c., Railway Co. vs. Illinois*, 118 U. S., p. 557 and many other cases.

Any State law which indirectly regulates the compensation of the carrier for inter-state business must also be invalid. The compensation or tariff charged, depends mainly on two things; first, the distance, and second the character of the goods carried. One of the considerations going to affect the character, as regards the freight charged, is the value of the goods and the amount of liability which will be imposed on the carrier if lost or destroyed, or in other words the freight is higher as the risk is greater. A statute which imposes on one carrier liability for the acts of some other carrier in the route to destination, when the first carrier has parted with the goods and lost all control over them, makes the risk of the shipment much greater and therefore enhances the cost of transportation, the effect being to accomplish indirectly what the State cannot do directly. But it may be said, if you have your contract signed, this result will be avoided. We reply that the shipper and the carrier must be left free, and if they deem it to their convenience and advantage not to make their contract in the way provided by the statute they should be allowed to do so, and if because of the statute, the contract they have made is not enforced then they are clearly controlled and regulated in an essential element of inter-state commerce by the statute. It is further said by the Supreme Court of Appeals of Virginia that such contracts, i. e.

contracts signed by the shipper, are not without precedent and that there was such a contract in *Hart vs. Pennsylvania Railroad Company*, 112 U. S., page 331. That case arose out of a shipment of live stock. Almost every shipment of live stock in the United States moves under a bill of lading signed by the shipper or his agent while goods rarely move under a bill of lading so signed. It would seem that if the bill of lading can be signed in the one case without imposing any burden on the business, it may also be signed in the other, but such is not the case and the universal manner in which the business is done shows that there must be some good reason for the difference and to require a change would be a burden to the business. All live-stock is loaded by the shipper or his agent and not by the carrier, and hence at the time of the delivery of the stock to the carrier the shipper or his agent is present and can conveniently sign the bill of lading, while in the case of goods the shipper is rarely, if ever, present when the goods are delivered to the carrier and receipted for. The shipper's driver in most cases can neither read nor write, and is not in any sense an agent, such as is contemplated in the statute. As the business would have to be conducted, if the terms of the statute are complied with, the carrier would refuse to receive the goods or issue a receipt or bill of lading for them until it was signed by the owner or his agent, appointed for that purpose. Hence in every shipment either the owner of some one appointed by him as agent, for the purpose of signing the bill of lading, must go to the depot of the carriar, no matter how distant, and be present and sign the bill of lading. Considering the great volume of commerce passing from State to State in this country, one sees at once that in the aggregate the requirement that necessitates such a thing as this becomes an intolerable restrain, nuisance and burden and should not be imposed without some necessity therefor, and if imposed at all should only be imposed by Congress which alone has

power to make uniform regulations applicable to the whole country.

Requiring a bill of lading to be signed, and prescribing a penalty if it is not, and affixing a further penalty even though it be signed, if the carrier does not give satisfactory proof to the shipper that the goods were not lost or damaged while in its possession, is surely more of a regulation of commerce than the following State laws, which have been held unconstitutional when applied to inter-state commerce.

In *Almy vs. State of California*, 24 Howard 169, this court held the statute of California unconstitutional which required a stamp to be affixed to every bill of lading. Commenting on this case in *Woodruff vs. Barham*, 8 Wallace 123, Mr. Justice Miller at pages 127–8 says that such a tax is a regulation of commerce and that the Almy case was well decided on this ground. If requiring a person to procure and use stamped paper for a bill of lading is a regulation of commerce, surely requiring a person to write out his contract of shipment and go possibly many miles to a depot and sign it, is also a regulation and much more of a burden than the California statute.

The State of Missouri passed the following act:

Sec. 1. No Texas, Mexican or Indian cattle shall be driven or otherwise conveyed into or remain in any county in this State between the 1st day of March and the 1st day of November in each year, by any person or persons whatsoever; provided, that nothing in this section shall apply to any cattle which shall have been kept the entire previous winter in this State. Provided further, that when such cattle shall come across the line of this State loaded upon a railroad car or steamboat, and shall pass through this State without being unloaded, such shall not be construed as prohibited by this act; but the railroad company or owners of a steamboat performing such transportation, shall be responsible for all damages which may

result from the disease called the Spanish or Texas fever, should the same occur along the line of such transportation; and the existence of such disease along such route shall be *prima facie* evidence that such disease has been communicated by such transportation."

"Sec. 9. If any person or persons shall bring into this State any Texas, Mexican or Indian cattle, in violation of the first section of this act; he or they shall be liable in all cases for all damages sustained on acount of disease communicated by said cattle."

This statute came under review in *Railroad Co. vs. Husen* 95, U. S. 465 and it was held to be unconstitutional, the second proviso in the first section being held to impose burdens and liabilities. It will be observed that the railroad company was not prohibited from transporting cattle by this statute through the State of Missouri, but it was provided that if in so doing they communicated the Texas fever to the cattle along its route they should be liable in damages for the same, and the existence of such disease along its route should be *prima facie* evidence that such disease was communicated by such transportation. The principle involved in the Virginia statute is very similar, and it makes no difference whether the burden or liability be great or small, the State can impose none. The Virginia statute imposes a burden and liability upon the carrier if certain things are not done at the making of the contract, just as effectually as the Missouri statute imposed a burden or liability upon the carrier if certain results followed the doing of a particular thing.

The State of Missouri passed another statute, which was as follows:

Sec. 1. All railroad companies, private companies, or individuals owning or operating a railroad or railroads in the State of Missouri are required to furnish a sufficient number

of double-decked cars for the shipment of sheep, to supply the demand for such cars on their repective lines and to allow shippers to load both decks in said cars with sheep to the aggregate extent of 20,000 pounds, which cars so loaded shall be received and transported by such railroad companies or private companies or individuals as one car-load of stock, and it shall not be lawful for said railroad companies, private companies or individuals to charge or receive for the transportation of a double deck car of sheep more than the legal rate of freight allowed for the shipment of stock."

This statute came under review and was passed on in the case of *Stanley vs. Wabash, etc. Railroad Company.*, 100 Missouri, page 435, and was held to be unconstitutional as applied to inter-state shipments. A railroad car is an instrument of commerce, just as much as a bill of lading is an instrument of commerce. If the State of Missouri could not constitutionally regulate the instrument of commerce in the one case by prescribing its character, why can the State of Virginia constitutionally regulate the instrument of commerce in the other case by prescribing its character, and imposing a liability if it be not in a particular shape? The regulation and control of commerce attempted by the Missouri statute was not near so great as will be the regulation and control of commerce if the statute of Virginia is held constitutional. The Virginia statute deals with the subject which lies at the very foundation of all commerce and without which commerce cannot exist.

The courts generally in this country have held that where a carrier accepts for transportation, goods destined to a point beyond the terminus of his own line, he shall not be liable for the loss or damage occurring beyond such terminus. The English courts have held the reverse of this and out of this has grown what is known as the American rule and the English rule. This court has had this question before it and it holds to the American rule and discards the English rule.

See *Railroad Company vs. Manufacturing Company*, 16 Wall, 318. In this case at page 324, Mr. Justice Davis says: "It is the duty of the carrier in the absence of any special contract to carry safely to the end of his line and to deliver to the next carrier in the route beyond. This rule of liability is adopted generally by the courts of this country, although in England at the present time and in some of the States of the Union the disposition is to treat the obligations of the carrier who first receives the goods as continuing throughout the entire route. It is unfortunate for the interests of commerce that there is any diversity of opinion on such a subject, especially in this country, but the rule that holds the carrier only liable to the extent of his own route and for the safe storage and delivery to the next carrier, is in itself so just and reasonable that we do not hesitate to give it our sanction." This statement of the law has been approved by this court in subsequent decisions. See—

*Railroad Company vs. Pratt*, 22 Wall., 123;
*Insurance Company vs. Railroad Company*, 104 U. S., 146;
*Myrick vs. Michigan, etc. Railroad Company*, 107 U. S., 102.

And the same was the rule in Virginia prior to the passage of Section 1295 of the Code of 1887. See—

*McConnell vs. Norfolk, etc. Railroad*, 86 Va., 248.

Where on page 254, Fauntleroy, Judge says:

"The liability of the common carrier is restricted to its own route unless it contracts to carry goods to their ultimate point of destination and such contract is not established by proof that the carrier accepted the goods with knowledge of their destination and named a through rate for the same; and in the absence of a special contract to de-

liver the goods at a point beyond its line, the receiving carrier is not liable for a loss or damage occurring to the goods after their delivery to the connecting carrier."

Some few courts in this country hold the initial carrier liable for the acts of succeeding carriers, which rule this court considers injust and unreasonable and declares that "it is unfortunate for the interests of commerce that there is any diversity of opinion on such a subject especially in this country." If it is unfortunate for the interests of commerce in this country that a few the courts of last resort should hold to this unjust and u sonable doctrine, still more unfortunate will it be for co nerce if the States of this Union shall be allowed by this court to regulate how, in what form or with what conditions and limitations the inter-state contract for carriage shall be made. There may be as many different and conflicting provisions as there are States, thus leading to an interminable confusion and embarrassment.

This court cannot control the Supreme Courts of the States unless a Federal question is involved, hence cannot remove the unfortunate effects on commerce due to conflicting State decisions on this subject, but when the legislature undertakes to adopt this unjust and unreasonable rule by statute and the State court changes its rule of decision in consequence of such legislation and holds the same to be constitutional, then this court has full power to prevent unjust and unreasonable legislation tending to produce a state of affairs unfortunate for the interests of commerce. This is a subject on which it is necessary that there should be one uniform rule for the whole country and that uniform rule can only be furnished by Congress, and where the matter is national and admits of or requires a uniform system of regulation, it is settled beyond dispute that the power of Congress is exclusive. Had Congress provided a uniform bill of lading for inter-state shipments which provided for

confining the liability to the line on which the loss occurred and did not require that the bill of lading should be signed by the shipper, then clearly the Virginia statute would be in conflict therewith and void and the reason which would make such legislation valid as an act of Congress makes it invalid as an act of a State Legislature. The contract of shipment is entire and if made in Virginia, valid laws of that State enter into and become a part thereof, binding on the other carriers forming links in the route, hence if this law is valid, we would have a law of Virginia which would control and regulate carriers in the most distant States. That such legislation is national in its character must be conceded and hence it follows that only that power authorized to act for the nation should be allowed to pass such laws.

The Court of Appeals of Virginia further says that section 1295 "in effect establishes a rule of evidence." The Supreme Court of Missouri said the same thing of a Missouri statute but with the curious result that they held a railroad company not liable, when, under the statute, if constitutional, it was clearly so.

In 1879 the State of Missouri passed a statute, now in the revised statutes, Sec. 944 which is as follows:

"Whenever any property is received by a common carrier to be transferred from one place to another, within or without this State, or when a railroad or other transportation company issues receipts or bills of lading in this State, the common carrier, railroad, or transportation company issuing such bill of lading shall be liable for any loss, damage or injury to such property caused by its negligence or the negligence of any other common carrier, railroad, or transportation company, to which such property may be delivered, or over whose line such property may pass; and the common carrier, railroad or transportation company, issuing any such receipt or bill of lading, shall be entitled to recover, in a proper action, the amount of any loss, damage or injury

it may be required to pay to the owner of such property from the common carrier, railroad or transportation company, through whose negligence the loss, damage or injury may be sustained."

This statute clearly provides that a railroad issuing a bill of lading for property which passes over other railroads en route to destination shall be liable for negligent loss of or injury to the property by such other carrier.

Its purpose was (as is clearly decided by Division No. 1 of the Supreme Court of Missouri, March 9, 1891, in the case of *Dimmett vs. Railway Company*, 103 Mo. 433, 15 S. W. 761), to establish the English rule in that State as contra-distinguished from the American rule, which rule is characterized by Mr. Justice Davis in the case of *Railroad Company vs. Manufacturing Company* above referred to as a "rule of liability."

This statute seems to have often been before the courts of Missouri for construction.

In the case of *Dimmitt vs. Railroad Company*, above referred to, notwithstanding the express terms of the statute they held the carrier when it received the property to be transported to a place beyond the terminus of its own line liable as such carrier to the place of destination *in the absence of special contract to carry only to the terminus of its own road*, holding that "a specific agreement that defendant (the carrier) was only liable to loss or damage occurring on its own line" was equivalent to a specific agreement that "the defendant only contracted to carry the property to the terminus of its own line;" they further held in that case that the bill of lading contained no express condition limiting the liability to the line of the carrier in whose possession the goods were when lost, notwithstanding that the bill of lading did provide that the initial carrier would carry to Omaha which was its terminus and there deliver to the next

carrier, it further appearing that the goods were lost by the negligence of the succeeding carrier. And the court further held that the enactment as thus construed becomes a rule of evidence by which to determine what the contract with the carrier is, in the absence of any specific one, and was violative of no constitutional right.

An examination of the language used in the statute will convince the court that the Missouri court placed a very violent construction upon the act, and it is evident that the purpose of this was to avoid running afoul of the federal constitution.

This pronouncement of the first division of the highest court was reviewed on the 7th of April, 1891, by the St. Louis Court of Appeals in the cases of *Drew etc. vs. O. & M.* 44 Mo. App. 416, and *Hist Publishing Company vs. Adams Express Company*, 44 Mo. App. 421, and in the Kansas City Court of Appeals on November 9, 1891, in the case of *Hill vs. Missouri Pacific*, 46 Mo. App. 517, the lower courts criticising delicately, but surrendering their own convictions before what they considered an authoritative exposition of the statute, although expressing doubt as to where the path they were then travelling would lead.

On December 22, 1891, Division No. 2 of the Supreme Court of Missouri considered the question in the case of *Nines vs. St. Louis etc. Railroad* 107, Mo. 475, 18 S. W. 25. In this case the bill of lading expressly provided that the receiving carrier should not be liable beyond its terminus, and the court sustained the contract as made *in the teeth of the statute* which did not make the liability dependent in any way upon the contract but only upon the receipt of the goods to be transported from one place to another within or without the State of Missouri, following the Dimmitt case in the forced construction of the statute in order to reach constitutional ground in their opinion for sustaining it.

On June 30, 1894, Division No. 2 of the Supreme Court of

Missouri again had the question up in the case of *McCann vs. Eddy*, 27 S. W. Rep., 541 (not reported in the Missouri reports) and by an opinion in which they all concurred it was held that the statute above copied did not prohibit a carrier from contracting with a shipper against liability beyond its own line; and that in making the carrier receiving the goods for shipment liable for connecting carrier's negligence, if construed to operate outside the State, said statute was an attempt to regulate inter-state commerce and unconstitutional. The *Dimitt* and *Nines* cases were reviewed by Judge Sherwood, who, in delivering the opinion, continued at page 542: "If the section under discussion is to be construed literally; if it is to be interpreted as casting on one railway company the burden of the negligence of another railway company, against whose negligence the company sued has explicitly contracted, as in the present instance, then I have no hesitation in saying I do not believe the Legislature has the power thus to interfere with the right of a railway company to contract, speaking in a general way, as it may see fit. This power of individuals or corporations to contract as they think best has been recently decided by this court to be placed beyond legislative interference by constitutional guaranties, both State and Federal, which uphold the right of 'due process of law,' and all that term implies. *State vs. Loomis*, 115 Mo. 307, 22 S. W., 350; see also *in re Jacobs*, 98 N. Y., 98; *Butcher's Union Cases*; 111 U. S., 746. * * * Moreover, if Section 944, *supra*, is to be construed as being operative beyond the boundaries of this State, then it is plainly a regulation of inter-state commerce, and therefore violative of Section 8 of Article I of the Federal Constitution. Any rule pertaining to the transportation of passengers or merchandise from one State to another is a regulation of inter-state commerce, and therefore, under the prohibitions of the Federal Constitution, a State is inhibited from making such regulations. * * *

In order to conspicuously show that the statute construed as plaintiffs desire, is plainly such a forbidden regulation, it is only necessary to suppose that the State of Illinois should enact laws in reference to merchandise transferred to that State from this State, and at variance with Section 944 aforesaid. As is aptly elsewhere said 'commerce cannot flourish in the midst of such embarrassments.'"

In construing the bill of lading at page 542 of the report last above referred to, Judge Sherwood said: "In the case at bar, the instrument which is the basis of this action is to be construed as a whole. Construing it in this way it is easy to see that the liability apparently assumed by the first clause of the contract is expressly qualified and limited by the thirteenth specific agreement aforesaid, which in clear and unambigious terms confines the liability of the defendant company to its own line of road," which as above said had already been decided in the *Dimmitt Case* to be equivalent to a specific agreement that the defendant only contracted to carry the property to the terminus of its own line.

On December 10, 1895, however, the case of *McCann vs. Eddy* came up before the Supreme Court of Missouri in *banc.*, and a result contrary to the opinion of Division No. 2 as delivered by Judge Sherwood was reached, s c. 133 Mo. 159; 33 S. W. 71.

In passing upon the contract which already had been passed upon by Judge Sherwood, Macfarlane, J., says, "that the agreement to carry from Stoutsville to Chicago is absolute and unconditional. The thirteenth condition or covenant can only be regarded as an attempt on the part of the defendant to relieve it from the responsibility of answering for the negligence of the carrier by which it undertook to complete the contract. The statute forbids such qualifica-

tion of the contract, it can only be held to relieve it from its common law, liability of insurer. The ruling of the court in respect to giving and refusing the instructions mentioned was correct."

An examination of the opinion of the court will show that the case of *Nines vs. Railroad Company* is no where alluded to, although the bill of lading in the case of *McCann vs. Eddy* is substantially the same as in the case of *Nines vs. Railroad Company* and the court held that the railway company was liable disregarding absolutely the clause in the agreement which they held valid in the case of *Nines vs. Railroad Company* and the special contract upon which the transportation was had.

Upon reading the opinion in the case of *McCann vs. Eddy*, 133 Mo. 559, this court will see that the decision turned upon the construction given to the bill of lading, which construction it is respectfully submitted is incorrect. The bill of lading provided that the M. K. & T. Railway should carry from Stoutville, Mo., to Chicago, Ill., and expressly agreed that the railway company should be released from liability beyond its own line except to protect the through rate of freight named in the bill of lading. The court held that this was absolutely a contract to carry through to Chicago, disregarding the express conditions limiting its liability to its own line.

The question again came up before the Supreme Court of Missouri in *banc*, on May 4, 1897, in the case of *Miller Grain and Elevator Company vs. Union Pacific* 40 S. W. 894. In this case the court construed the Nebraska statute on the subject of connecting carriers saying. "We have given a similar construction to a statute of our own State whose provisions are in substance the same. *Dimmitt vs. Railroad Company*."

In the Miller case, notwithstanding that the bill of lading was substantially the same with the bill of lading construed by the court in the *Nines case* and with the bill of lading con-

strued by the court in the case of *McCann vs. Eddy*, the Missouri Supreme Court held that the contract of the Union Pacific was only to carry to its terminus and there deliver to the next connecting carrier, hence it was not liable, notwithstanding the plain language of the statute copied above, Macfarlane, Judge, saying, "we are unable to see * * * that the construction we give this statute makes it repugnant to that provision of the constitution of the United States which gives to Congress alone the power to regulate commerce among the States. The act in no way operates as a regulation of trade and business among the States. No burden or restriction on transportation is imposed. Carriers are left free to make their own contracts in regard to compensation for their services for transportation between the States subject to congressional regulations. The statute merely prohibits a carrier, who, by contract, undertakes to transport property to a point beyond its own route from relieving itself of responsibility for neglect to properly perform its duty. It only imposes the duty and liability which the law, from considerations of public policy, imposes upon all common carriers in the transportation of property over their own lines, though they may extend into other States."

It will thus be seen that the Supreme Court of Missouri in construing a statute somewhat analagous to the one in the case at bar has occupied conflicting positions and has manifestly forced the construction of the statute from the plain meaning of the words used in order to find some ground on which it could claim it to be constitutional, and its adjudications therefore can hardly be even persuasive here.

In the case at bar, the Court of Appeals of Virginia did not so construe the Virginia statute as to allow the carrier and shipper to contract as they might see fit, notwithstanding the statute, and the effect of the decision of the Supreme Court of Appeals of Virginia is that the shipper and carrier cannot mutually agree to dispense with the requirements of

the statute because the bill of lading in this case provides that "the acceptance of this bill of lading is an agreement on the part of the shipper, owner and consignee of the goods to abide by all its stipulations, exceptions and conditions as fully as if they were all signed by such shipper, owner and consignee." Surely the decision of the Court of Appeals of Virginia that in consequence of this statute the parties could not agree to waive the requirements thereof, makes this a statute which absolutely controls, regulates and binds the parties in making their contract of shipment.

The section of the Virginia code which we are considering here, to-wit: section 1295, goes much further than the Missouri statute as construed by the Missouri court in the last ruling upon the subject. The Missouri statute, says its Supreme Court, merely prohibits the carrier which has contracted to transport property to a point beyond its own line, from relieving itself from the liability as common carrier throughout, to destination. In Virginia the statute undertakes to prescribe what the contract shall be unless there is an express agreement in writing and signed. It is not the exercise of the police power; it does not seek to regulate the duties, rights and liabilities of citizens, generally; it does not provide for the safety of persons and property; it does not declare what laws shall govern the dealing with a contract of carriage after it is made; it does not deal with a subject which is local in its nature and can best be dealt with by laws also local and suited to the peculiar circumstances of the locality; it is not a statutory enactment of a duty which already exists at common law; it is a statute which compels the shipper and carrier when engaged in agreeing between themselves as to the terms and conditions which they think will best promote their mutual interests, to make their contract in a particular manner, or else impose a penalty upon one of the parties. In its practical effect it is a regulation

of commerce, and when its effect extends beyond the State line it is regulative of commerce between the States.

Webster defines the words "to regulate" as follows: "to adjust by rule, method or established mode—to subject to governing principles or laws."

Section 1295 of the Code of Virginia is as follows:

"Sec. 1295. *Liability of carrier for loss or injury to goods.* When a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless, at the time of such acceptance such carrier be released or exempted from such liability by contract in writing signed by the owner or his agent, and, although there be such contract in writing, if such thing be lost or injured, such common carrier shall himself be liable therefor, unless, within a reasonable time after demand made he shall give satisfactory proof to the consignor that the loss or injury did not occur while the thing was in his charge."

The compensation for carriage, or freight rate, depends and is based upon the cost of transportation, risk involved and service rendered. A common carrier is an insurer, and in fixing the amount of his compensation the insurance feature of the contract is a dominant element. Read section 1,295 as put into practical operation, and we find that the Court of Appeals construes it as if its phraseology were as follows:

When a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, (that is to say, for the same rate per ton per mile, or amount of compensation, said carrier shall carry and insure such thing against loss or damage resulting from whatever

cause save inherent defect, act of God, or of the public enemy to his own terminus and shall also insure such thing against loss or damage resulting from whatever cause save inherent defect, act of God, or of the public enemy while in the custody of any other carrier between said terminus and destination, including, however, the perils of rivers and seas where such carriage is by water) unless at the time of such acceptance such carrier be released or exempted from such liability by contract in writing signed by the owner or his agent; and, although there be, such contract in writing, if such thing be lost or injured such common carrier shall himself be liable therefor, unless within a reasonable time after demand made, he shall give satisfactory proof to the consignor that the loss or injury did not occur while the thing was in his charge.

This is the practical effect and true meaning of this statute, and it is a self-evident proposition that it is a regulation of commerce.

Now apply this statute to the case at bar and we find that the law would read as follows :

When the Richmond and Alleghany Railroad Company, which is a corporation extending from Richmond to Clifton Forge, accepts for transportation Patterson's tobacco directed to Bayou Sara, Louisiana, said Richmond and Alleghany Railroad Company shall be deemed thereby to assume an obligation for the safe carriage of said tobacco to said Bayou Sara, Louisiana, (that is to say, for its mileage proportion of a special rate of seventy cents per one hundred pounds made between Richmond and New Orleans the said Richmond and Alleghany Railroad Company shall carry said tobacco and insure the same as aforesaid to its own terminus, i. e., Clifton Forge, and shall also insure, as aforesaid, said tobacco against the risk of loss or injury while in the custody

of any other carrier including, however, perils of rivers and seas while said tobacco is being transported over such connecting lines as are by water) unless at the time of such acceptance said Richmond and Alleghany Railroad Company be released or exempted from such liability by contract in writing known as a bill of lading signed by Patterson or his agent; and, although there be such contract in writing or bill of lading, if such tobacco be lost or injured the said Richmond and Alleghany Railroad Company shall itself be liable therefor, unless within a reasonable time after demand made said Richmond and Alleghany Railroad Company shall give satisfactory proof to said Patterson that the loss of or injury to said tobacco did not occur while the same was in the charge of the said Richmond and Alleghany Railroad Company.

And to still further demonstrate the extreme conclusion to which this statute leads if held constitutional, let us apply it to a shipment to Liverpool with the rates that actually prevail to-day, bearing in mind that the present through rate for transporting tobacco of the actual market value of $40 per one hundred pounds from Richmond, Va., to Liverpool, Eng., is 28 cents; that the railroad proportion of that rate is 3 cents per 100 pounds from Richmond to Newport News, the seaboard; that the ocean rate from Newport News to Liverpool is 25 cents per 100 pounds, and that the minimum marine insurance is now three-tenths of one per cent.

Now, with this explanation, we find that the statute as practically applied to-day would result as follows:

When the common carrier, which is a corporation operating a line of railway extending from Richmond to the seaport, Newport News, Va., accepts from the R. A. Patterson Tobacco Company for transportation, tobacco directed to Liverpool, England, said common carrier shall

be deemed thereby to assume an obligation for the safe carriage of said tobacco to said Liverpool, England (that is to say, for its proportion of 3 cents per 100 pounds out of the rate of 28 cents per 100 pounds made between Richmond, Va., and Liverpool, Eng., the said common carrier shall carry said tobacco and insure the same as aforesaid to its own terminus, *i. e.*, Newport News, and shall also insure as aforesaid said tobacco at a cost to it of three-tenths of one per cent. of the value of said tobacco against risk of loss or injury while in the custody of the connecting steamship company, including perils of the seas, while the said tobacco is being transported by such connecting steamship company between said terminus and said destination) unless at the time of such acceptance such common carrier be released or exempted from such liability by contract in writing, known as a bill of lading, signed by said R. A. Patterson Tobacco Company or its agent; and, although there be such contract or bill of lading, if such tobacco be lost or injured, the said common carrier shall itself be liable therefor, unless within a reasonable time after demand made said carrier shall give satisfactory proof to said R. A. Patterson Tobacco Company that said loss or injury did not occur while said tobacco was in its charge.

The effect of this statute upon the through rate would be, if constitutional, to impose upon the carrier the duty of paying three-tenths of one per cent of the money value of the article carried for which it only got at the rate of three cents per hundred weight to transport and insure to its terminus. The ocean rates are to a great extent fluctuating quantities, depending upon the demand and offers made at ports other than Newport News. In other words the port of Newport News in order to secure bottoms must offer to vessel carriers rates of freight as remunerative as Baltimore, Philadelphia or New York, otherwise the vessels

will secure cargoes at ports other than Newport News. The locality of Richmond in order to get into the Liverpool market must place its tobacco in competition with shippers from other ports. The rate is made with the knowledge on the part of the shipper and carrier that the marine risk is not included. We venture to state that there is not a single shipment that does not go under a marine policy, taken out by the shipper. Under such circumstances the effect of the opinion of the Court of Appeals of Virginia, holding said statute constitutional, is that notwithstanding the parties made their contract with the knowledge that the marine risk is not incurred yet by this statute such risk is imposed in addition to the service of carriage, for a total compensation of 3 cents per hundred weight — a risk that skilled experts in the business estimate at three-tenths of one per cent of the money value, and will not take for less.

Applying this last illustration to a shipment of 1,000 pounds of Patterson's tobacco which is worth $400, we find the proportion of the rail carrier to be 30 cents—the proportion of the vessel carrier is $2.50, and the marine insurance three-tenths of 1 per cent of $400, or $1.33. In other words for 30 cents the rail carrier is required by the statute to assume an obligation for the safe carriage from Newport News to Liverpool, which skilled experts in the business, estimate at $1.33, and will not do for less.

If it be said that the carrier can avoid this risk by simply having its bills of lading signed by the shipper, we reply that the universal custom in America is that such bills are not, and as heretofore shown, cannot be conveniently signed; and that the statute is still obnoxious to the charge that it is a regulation of commerce because it provides in effect that if the bill of lading is signed the rate may be one thing, and if it is not signed you cannot transact the business at all, because with the present narrow margin which results from competition from the out ports, no carrier, as explained above,

could do business on the basis of three cents per hundred pounds, when the cost of giving the insurance imposed, is three-tenths of one per cent of the money value of the article carried.

The commerce therefore between the State of Virginia and foreign nations, and among the several States of this union, is in fact, as the foregoing illustrations show, made subject to the Virginia Statute, section 1295; it is a regulation of such commerce, and hence is in conflict with the Federal constitution and void.

A consideration of the foregoing illustrations, taken from what would be the practical application of this statute shows that the contention that this statute is necessary "to protect shippers from imposition," and hence so salutory as to incline the court in its favor and to maintain its constitutionality if possible to do so, is not well founded.

It is respectfully submitted that the judgment of the Supreme Court of Appeals of Virginia (record, m. p. 19–20) should be reversed.

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